Northwestern Journal of International Law & Business

Volume 26
Issue 2 *Winter*

Winter 2006

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I. INTRODUCTION

Choice of law in contracts has been a century long discussion and debate for scholars in the West, but in China it did not garner any attention until the nation adopted an open door policy in the late 1970s. In a broader sense, conflict of laws, or private international law (as it is commonly referred to outside of the United States), is not well developed in China. Although it has been claimed that embryonic conflict of law legislation was seen in China as early as the Tang Dynasty (618–907),[1] there were barely any choice of law rules governing commercial matters in the country before 1979.[2]

There are at least two explanations for the under-development of conflict of laws legislation and literature in China. The first is historical; during more than 2000 years of Chinese history the country was basically a

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[1] The most acclaimed ancient Chinese choice of law rule is the provision on application of law in the Tang Code (or *Yonghui* Code), adopted in 651. Under the provision, "a case involving persons who are the subjects of the same foreign sovereignty shall be governed by the law of the said sovereignty, and a case concerning persons who belong to different sovereignties shall apply the code." Note, however, that in Chinese history, a code, if any, applied to both civil and criminal cases.

[2] The only choice of law rules in China between 1911–1979 were perhaps the Rules of Application of Law adopted by the Nationalist government on August 5, 1918 and the application of law provisions scattered in a few Consular Treaties in the 1950s between China and other countries. For example, Article 20 of the 1959 Sino-Soviet Consular Treaty provided that any property, including both movables and immovables, left by a citizen of one country after his death in the territory of another country shall be governed by the law of the country where the property is situated. Note that in the 1918 Rules of Application of Law, there was nothing about contracts or torts.

closed and self-sufficient society in which there was little need to engage in "foreign business transactions."[3] The second reason has to do with the philosophy of "socialist supremacy" that dominated the nation during the period between when the Communist party took power in 1949 and when the country initiated economic reform in 1979. Under this philosophy, state ownership reached almost every corner of the country and no individual or private person was permitted to participate in any business transaction, especially international ones.

Nevertheless, the last two decades have witnessed the remarkable progress China has made in conflict of laws legislation. All of this effort was made in line with the country's economic reform aimed at moving the nation towards the main stream of the world economy. As far as choice of law rules are concerned, contracts is the area of law in which many of these rules were adopted. To be more specific, the first set of choice of law rules was provided in the 1985 Foreign Economic Contract Law,[4] followed by the General Principles of Civil Law, promulgated in 1986 ("1986 Civil Code").[5] In 1999, when the Contract Law of China was adopted ("Contract Law"), the rules regarding choice of law in contracts were stipulated in Article 126.[6]

In addition, in order to implement the choice of law rules, the Supreme People's Court, in its capacity as interpreter of the application of law as prescribed by the Organic Law of the People's Courts of China,[7] issued

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[3] There were a number of "events" in Chinese history where trade and commercial activities were promoted between China and its neighboring countries or regions, but most of them were not motivated by the desire to expand business transactions. For example, one such "event" was called "Zhang Qian being as an envoy to the west regions" that occurred in the Han Dynasty (202—220 BC), which resulted in a widely-known legend called "Silk Road." The main purpose of the envoy going to the west was unfortunately not for trade but to deal with the minority tribes that were deemed dangerous to the emperor. Another event was "Zheng He's seven trips to the west by the sea" (now the areas of Southeast Asia and the Indian Ocean) during the Ming Dynasty (1368–1636) that helped develop trade between China and countries nearby. Although the official reason for Zheng He to make the trips was to promote trade, many historians in China believe that the actual purpose was to round up the dethroned Emperor Zhu Yongwen, who was said to have escaped the country during the *coup d'etat* led by his brother Zhu Di.

[4] *See* Law on Economic Contracts Involving Foreign Interest (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 21, 1985, effective July 1, 1985), arts. 37–41, *translated in* ISINOLAW (P.R.C.).

[5] *See* THE GENERAL PRINCIPLES OF CIVIL LAW OF PEOPLE'S REPUBLIC OF CHINA (2000), *available at* http://www.qis.net/ chinalaw/prclaw27.htm [hereinafter 1986 Civil Code].

[6] *See* THE CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1999). An English text is available at http://cclaw.net/lawsandregulations/ chinese_contract_law.txt.

[7] Organic Law of the People's Courts (promulgated by the Nat'l People's Cong., July 1, 1979), art. 33, *translated in* ISINOLAW (P.R.C.); *see* XIAN FA art. 67 (1982) (P.R.C.) (noting that under the Chinese Constitution, the interpretation of law rests with the Standing Committee of the National People's Congress).

several opinions or explanations concerning the determination of applicable law in contractual cases.[8] Moreover, in 2000 the Chinese Institute of Private International Law published a Model Law of Private International Law of China ("Model Law"), which was intended to serve as a kind of restatement of law. Section 8 of Chapter III of the Model Law specifically deals with the application of law in contracts.[9]

Of course, determination of the law that governs contracts has long been one of the most controversial issues in the area of conflict of laws or private international law. As Professor Joseph Beale, the reporter of the First Restatement of the Conflict of Laws, pointed out in 1909, "no topic of the Conflict of Laws is more confused than that which deals with the law applying to the validity of contracts."[10] Unfortunately, today the matter of choice of law for contracts remains complicated.[11]

Unlike other legal areas in which state interests are more heavily involved and legal rules are more settled and certain, such as family relations, property and torts,[12] contracts are more various in type.

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[8] For example, on April 2, 1988, the Supreme People's Court issued *The Opinions Concerning Implementation and Application of the General Principles of the Civil Law of the People's Republic of China (Provisional),* which contained several articles dealing with contract issues. The Opinions were revised on December 5, 1990, *available at* http://www.law-lib.com.cn/law/law_view.asp?id=15743 [hereinafter 1988 Opinions]. On November 19, 1999, in order to help implement the Contract Law, the Supreme People's Court promulgated *The Explanations to Several Questions Concerning Application of Contract Law of the People's Republic of China.* A full text of the Explanations is *available at* http://www.law-lib.com.cn/law/law_view.asp?id=70172. Another example is the Supreme People's Court's *Explanations to the Application of Law to the Cases Involving Disputes over the Contract of Sale of Marketable Residential Housing, available at* http://www.law-lib.com.cn/law/law_view.asp?id=74535.

[9] *See* CHINESE INSTITUTE OF PRIVATE INTERNATIONAL LAW, MODEL LAW OF PRIVATE INTERNATIONAL LAW OF CHINA (2000) [hereinafter MODEL LAW].

[10] Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 1, 1 (1909). A similar comment made by British conflict of laws scholars in 1940 was that "[f]ew problems in the Conflict of Laws appear to be less settled . . . than the law which should govern the material validity of a contract." J. H. C. Morris & G. C. Cheshire, *The Proper Law of a Contract in the Conflict of Laws*, 56 LAW Q. REV. 320, 320 (1940).

[11] As Professor Weintraub suggests, contracts are still commonly referred to as "the most complex and confused area of choice of law problems." RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 438 (4th ed. 2001).

[12] For example, as the British scholar J.H.C. Morris indicated:

> [I]n the field of marriage and divorce the relevant legal rules need to be such as will enable the status and parties to be established with as much as certainty as possible. That is important both to parties themselves and to the State, whose interest is evidenced by the requirements in every developed legal system of publicity and registration both for creation and dissolution of marriage. . . . By contrast there is much less State interest in the ephemeral commercial transactions, often entered into with little or no formality, which give rise to contractual obligations.

Accordingly, the rules governing contracts are generally more flexible in order to meet the different needs arising from commercial transactions, particularly in the international arena. The variety of contracts and the flexibility of rules pose a number of difficulties to the parties who would very likely be subject to different laws and legal systems. Although choice of law rules purport to achieve a trifurcated goal, namely predictability, certainty and simplicity,[13] the rules as applied to contracts still seem far from the uniformity that would best serve that goal.

For example, party autonomy has become a commonly accepted principle that allows the parties to choose the law that will govern their transactions.[14] The substance and scope of this principle, however, differs from country to country.[15] In the situation where the parties' choice is absent, the applicable law issue could become a nightmare, not only to the parties but to their counsel as well.[16] Even within a single contract, the diversity of contractual issues can make the applicable law a tough choice. As a result, a practical approach is being employed to subject different matters of contract to different laws—known as "*dépeçage*" (splitting).[17]

On the other hand, conflict of laws scholars are amazed by the mystery of choice of law issues in contracts and have developed all kinds of theories and doctrines in an attempt to find the ultimate solution.[18] Unfortunately, such doctrinal multiplicity often causes more confusion and results in an increase in the uncertainty of the legal consequences that parties may have to encounter when dealing with such an issue. Not even the label for the applicable law is consistent. In Britain, for example, this term is generally called the "proper law of the contract." In many other countries, there exists no such term. With regard to the meaning of the term itself, some

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J. H. C. MORRIS, THE CONFLICT OF LAWS 319 (David McClean ed., 5th ed. 2000).

[13] *See* Willis L. M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 697 (1963).

[14] *See* Ole Lando, *Chapter 24: Contracts*, *in* 3 PRIVATE INTERNATIONAL LAW, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 33 (1976). According to Professor Weintraub, the "party autonomy concept is the keystone of the Contracts chapter of the Second Restatement of Conflict of Laws . . . ." WEINTRAUB, *supra* note 11, at 447.

[15] *See* Lando, *supra* note 14, at 13–53.

[16] *See* David Hricik, *Infinite Combinations: Whether the Duty of Competency Requires Lawyers to Include Choice of Law Clauses in Contracts They Draft for Their Clients*, 12 WILLAMETTE J. INT'L & DISP. RESOL. 241 (2004) (including a general discussion of issues faced by counsel).

[17] *Dépeçage* is defined in Black Law's Dictionary as the process whereby different issues in a single case arising out of a single set of facts are decided according to the laws of different states. BLACK'S LAW DICTIONARY 469–70 (8th ed. 1999). *See* Scudder v. Union Nat'l Bank, 91 U.S. 406, 411 (1875) (ruling of J. Hunt; deemed a well-considered decision concerning application of "*dépeçage*").

[18] As one scholar commented, in this field the laws of the world offer an almost continuous spectrum regarding the flexibility of the rules. *See* Lando, *supra* note 14, at 4.

scholars say that it is defined as the law with which the contract has the closest factual connection.[19] Others believe it is defined as the law under which the parties may fairly be presumed to have intended the contract to be governed.[20]

As for choice of law methods, the differences are even more varied. In the United States alone, there are several modern approaches including, among others, the interest-based method,[21] the factors-oriented approach,[22] and the relationship-focused doctrine.[23] Furthermore, this is in addition to the so-called traditional approach that is territorially premised.[24]

Additionally, though courts normally prefer to apply the law of the forum they often have to apply law other than that of the forum. The balance between maintaining territorially-based sovereignty and the need for furthering cross-border business transactions makes it necessary for a court to apply the law of another state or country in certain cases in order to achieve the optimal result. In doing so, a court will follow the choice of law approaches that are prevalent in the jurisdiction in which it sits. As a result, the resolution of choice of law problems is handled differently in different courts.[25] This uncertainty often makes parties to a contract and

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[19] *See* Morris & Cheshire, *supra* note 10, at 337.

[20] *See* Lando, *supra* note 14, at 4.

[21] In the United States, one of the most influential modern choice of law approaches is "governmental interest analysis" developed by Professor Brainerd Currie. Under Professor Currie's approach, the process of determining applicable law is essentially one of construction or interpretation of the government interest of the states involved since "[e]ach state has a policy, expressed in its law, and each state has a legitimate interest, because of its relationship to one of the parties, in applying its law and policy to the determination of the case." Brainerd Currie, *Married Women's Contracts: A Study in Conflict of Law Method*, 25 U. CHI. L. REV. 227, 252 (1958).

[22] This approach would include David Cavers' "principles of preferences," Robert Leflar's "better rule," and Arthur von Mehren's "functional analysis." All of these doctrines have one thing in common in that the choice of law is determined on the basis of different factors. For example, under Leflar's "better rule," the determination of applicable law shall take into account the following aspects: (a) predictability of results, (b) maintenance of interstate and international order, (c) simplification of the judicial task, (d) advancement of the forum's governmental interests, and (d) application of the better rule of law. *See* GENE SHREVE, A CONFLICT OF LAW ANTHOLOGY 153–320 (2003).

[23] This is the most significant relationship approach under the Second Restatement of Conflict of Laws: if the effective choice by the parties is absent, the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under choice of law principles. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[24] The traditional American choice of law approach is the one embedded in the First Restatement of Conflict of Laws, which rested on the notion of "vested rights." *See* ROGER C. CRAMTON ET AL., CONFLICT OF LAWS, CASES – COMMENTS – QUESTIONS 5 (5th ed. 1993).

[25] In the United States in 2004, for instance, among the fifty states plus the District of Columbia and Puerto Rico, eleven states apply the traditional choice of law approach to

their counsel frustrated.

More strikingly, the development of the internet has significantly affected the ways with which business transactions are dealt. The free flow of information beyond national territorial boundaries and government control enables transactions to take place in "cyberspace"—a world in which the location of an event or the whereabouts of a person may not be readily identifiable. An immediate consequence of this is the difficulty in determining which law governs a transaction that took place in cyberspace. This is especially so because many current choice of law rules are focused primarily on geography. Thus, a call for rethinking the choice of law rules has emerged. Some have suggested exploring new foundations for choice of law as a whole.[26]

This article, however, is not intended to address the difficulties of choice of law as applied to contracts. Rather, it will focus on how choice of law issues in contracts are being solved in China, a country that has the fastest growing economy in today's world[27] and has a legal system with which many in the West feel unfamiliar. The purpose of this article is to analyze the choice of law methodologies that are employed to deal with contract matters in China, and to examine Chinese choice of law scholarship and the doctrines as they have developed in theory and applied in practice in the courts.

This article attempts to emphasize that the choice of law analysis in China is distinct from that of other countries, despite the fact that many of the theories and approaches originate in Western countries. The underlying argument is that the ongoing economic reform in China has become a dramatic and driving force for change in the country. This change necessarily shapes the development of choice of law in China in a unique way, and also demonstrates how China is getting closer to the rest of world while searching for the "China brand" theory and approach in this regard.

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contracts, twenty-four states follow the relationship-focused approach, and seventeen adopt other approaches. *See* Symeon Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey,* 53 AM. J. COMP. L. 919 (2004).

[26] For example, a suggestion to "restructure the way in which we think about choice of law" is to "abandon the traditional and almost universal reliance on the notions of sovereignty as a normative justification for choice-of-law rules and focus instead on the welfare of the parties affected by those rules." Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L. J. 883, 884 (2002).

[27] Between 1978–2004, China's gross domestic product grew at an average rate of 9.4% annually. Hu Jintao, President, P.R.C., Keynote Speech at the 2005 Fortune Global Forum (May 16–18, 2005), http://politics.people.com.cn/GB/1024/3392948.html. According to the American Chamber of Commerce (People's Republic of China). China's prominence in the global economy rose during the past year. Increased trade volumes and rapid domestic growth were fueled by a combination of market forces and government infrastructure investment. *See* AM. CHAMBER OF COMMERCE, WHITE PAPER 2004—AMERICAN BUSINESS IN CHINA (2004), *available at* http://www.amcham-china.org.cn.

What seems to have emerged is what will be called, for the purposes of this article, the "China Phenomenon." This phenomenon can be seen in several ways. First of all, though China has a unitary legal system, the system is now entangled with the quasi-sovereign states of Hong Kong and Macao. These quasi-states raise choice of law issues not only between China and other countries, but also between China's mainland and its quasi-sovereign regions. Second, the clash between the concepts commonly accepted in Western countries and Chinese tradition often seem so obvious that a well-balanced symmetry needs to be established. For instance, China, which has a centralized economic structure based on paternalistic traditions, is still struggling to determine the significance of the party autonomy theory, which is premised on the principle of freedom of contract. Third, China's desire and need for a place in the global market has been a strong impetus for China to open its door to international trade. This in turn makes choice of law in China more internationally oriented. As an example of this, the international substantive law rules of international treaties and customs are commonly deemed to be a part of private international law in China.[28]

Part II of this article addresses choice of law issues in contracts that are deemed to be "foreign" in China. Part III then discusses the evolution of choice of law theories in China and the development of these doctrines. Part IV examines the ability of parties to express their own choice of law preferences in their contracts and the degree of freedom of choice. Part V focuses on judicial discretionary determination of applicable law in the absence of choice of law by the parties. In Part VI, the matters concerning application of international treaties in foreign contracts are addressed. Finally, the article concludes that while bearing strong influences from Western approaches, choice of law in China as applied to contracts is developing and will continue to develop in a uniquely Chinese way. Furthermore, such development in China may have a broader influence and help resolve complex choice of law matters in contracts in the future.

II. CHOICE OF LAW APPLICABLE TO FOREIGN CONTRACTS

A choice of law issue inevitably arises when two or more legal systems or jurisdictions are involved in a transaction (e.g., a contract) or incident (e.g., tortious conduct or harm). A determination must be made as to which law shall apply to the controversy in question.[29] Thus, for a case in which choice of law becomes relevant, the most distinctive nature is

[28] *See* HAN DEPEI, PRIVATE INTERNATIONAL LAW, TEXTBOOK SERIES FOR 21ST CENTURY 8 (2000).

[29] It is generally understood that choice-of-law problems "arise in two settings: cases with facts connected to different jurisdictions, and cases involving enactments of different lawmakers within a single jurisdiction." CRAMTON, *supra* note 24, at 2.

"foreign" or "outside jurisdictional territory." In the United States for example, each state is regarded as an independent "sovereign" under the framework of the federal system. Therefore a choice of law issue arises when a dispute spills across state lines—a sister state will be treated as foreign to the forum state.[30] Thus in conflict of laws issues in the United States, the word "foreign" would contain the meaning of both sister state and foreign country. Consequently, a foreign case in the United States for purposes of conflict of laws could be either a domestic case that involves different states or an international case that concerns a foreign country.

However, in a country like China where the nation has a unitary legal system, the term "foreign" is interchangeably used with "international." Although China is divided into different provinces and municipalities, they are not independent sovereignties; rather they are local government units (or sub-political divisions) under the leadership of a central government.[31] Therefore, a foreign case in China typically means an international one.

Whatever the term "foreign" may denote, the reality facing every country today is that the increasing mobility of people and products crossing country borders and the globalization of business transactions all make people more exposed to a multitude of diverse systems of law. As a result, a question of how to effectively dispose of the legal rights and obligations of individuals in conflicting legal systems in the international arena becomes a question that requires special attention. The issues involved not only enhance the need for the determination of which law governs, they also complicate the way in which the choice of law is made.

As noted, conflict of laws in China is commonly considered private international law. Moreover, conflict of laws in China is generally deemed a part of private international law, as opposed to the unified substantive law contained in international treaties as well as international customs. What is peculiar is that private international law in China, as compared with conflict of laws in the United States,[32] has a much broader scope, which includes rules regulating the civil status of foreigners as well as the rules of international civil procedure.[33] Therefore, in Chinese conflict of laws literature the rules are often characterized as the rules that provide which law will apply to what foreign civil and commercial legal relations.[34] Iin this sense, the conflict of law rules in China are often regarded as

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[30] *See* LUTHER MCDOUGAL III & ROBERT FELIX PALPH WHITTEN, AMERICAN CONFLICT OF LAW: CASES AND MATERIALS 1 (4th ed. 2004).

[31] This only refers to mainland China, not including Hong Kong and Macao which have special status under the law and treaties.

[32] In the United States, conflict of laws typically includes three parts: jurisdiction, choice of law, and recognition and enforcement of foreign judgments (including arbitral awards).

[33] *See* DEPEI, *supra* note 28, at 7–9.

[34] *See id.* at 93.

equivalent, if not identical, to choice of law rules.[35]

Thus, in a contract, there would be no choice of law matters in China unless and until the contract becomes or is marked "foreign." In this context, it is important to define the term "foreign" and to distinguish a domestic case from a foreign one. The importance lies with the fact that if the case falls within the category of "foreign," a special set of rules and provisions would apply because in Chinese law, foreign cases are treated and handled (at least in part) differently from domestic ones.[36]

A. Differences Between Domestic and Foreign Cases

In light of conflict of laws, a major difference between a country with a federal system and a country with a unitary system is how the term "foreign" is defined. In China, under the unitary system, the central government has the authority to exercise its power all over the nation; the national laws in terms of legal hierarchy preempt any rules and regulations adopted at the local level. Therefore, the term "foreign," as used in the context of choice of law, refers generally to "outside the territory of the country."[37] A civil case that has an "outside territory element" will then be classified as a foreign civil case.[38]

A commonly used phrase in China to indicate "foreign" in civil cases is "foreign civil relations." Under the 1986 Civil Code, any case that involves foreign civil relations shall be governed by the special provisions of the Civil Code if the application of law would need to be determined.[39]

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[35] *See* HUANG JIN, PRIVATE INTERNATIONAL LAW, UNIVERSITY TEXTBOOK SERIES 27 (1999).

[36] For example, in the 1986 Civil Code, there is a special chapter (Chapter 8) that deals specifically with foreign civil relations. In addition, in Chinese people's courts, there is a special division that is designated to handle foreign civil cases. *See* 1986 Civil Code, *supra* note 5.

[37] In countries with a federal system, such as the United States, the term "foreign," in the sense of conflict of laws, mostly means a "different jurisdiction," and thus conflict of law covers both cases that involve application of a foreign country's law and cases in which application of a "foreign" (sister) state law is at issue. For example, in his book on conflict of laws, Professor Russell Weintraub this issue by comparing the differences between Texas law and Scottish law. In his case, if a plaintiff is a "citizen" of Texas, the Texas law will be domestic law to him, while the Scottish law will be the foreign law (law of a foreign country). If Plaintiff is a "citizen" of Florida, both Texas law (sister state law) and Scottish law (foreign country law) will then be the "foreign law" to him. WEINTRAUB, *supra* note 11, at 2–3.

[38] In comparison, foreign element in the United Kingdom is defined as "simply a contact with some system of law other than that of the 'forum,' that is, the country whose courts are seised of the case." MORRIS, *supra* note 12, at 2. In the United States, however, foreign, in the context of conflict of laws, could mean "a different jurisdiction," which includes both a foreign country and a sister state within the United States. *See* CRAMTON, *supra* note 24, at 2.

[39] The special provisions are contained in Chapter 8 of the Civil Code, which is entitled

According to the interpretation of the Supreme People's Court, foreign civil relations are the civil relations in which one or both parties are foreign, a stateless person or a foreign legal person, the subject matter underlying such relations is located outside the territory of China, or the legal facts that cause the relation to be established, changed or extinguished occured outside of China.[40]

Equally then, a contract is foreign when (a) at least one party is not a Chinese citizen or legal person, (b) the subject matter of the contract is in a foreign country (e.g., the item to be sold or purchased is located outside of China), or (c) the conclusion or performance of the contract is made in a foreign country. When a contract is characterized as foreign, the question as to which law shall govern the contract becomes relevant. If a contract is domestic in nature, it is without question that the contract will be subject to Chinese law only.

B. Interregional Law Conflicts: A New Challenge

Although China has a unitary legal system, the "unitary" status affects only the mainland; it excludes Hong Kong and Macao despite the fact that these two regions became part of China in 1997 and 1999 respectively.[41] This creates a factual pattern that represents a unique type of interregional conflict of laws and imposes challenges to the country as to how the law conflicts between mainland China and those regions are to be resolved effectively.

Under the Chinese Constitution, Hong Kong and Macao are each governed by their "basic law" and retain the status of "Special Administrative Regions" ("SAR") after their return to China. One of the most important features of the SAR status is that regions possessing it have the right to maintain their own legal systems which differ from that of the mainland.[42] Tthe SARs have virtually all governing powers over their region, excluding defense and foreign affairs.

As a result, there are actually three legal systems that now exist concurrently in China. The legal system in Hong Kong is basically the common law inherited from the British legal system, while in Macao the

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"Application of Law in Foreign Civil Relations." There are nine articles dealing with choice of law issues. *See* 1986 Civil Code, *supra* note 5.

[40] *See* Organic Law of the People's Courts, *supra* note 7, at art. 178.

[41] Hong Kong used to be a colony of the United Kingdom, and was handed over to China in 1997. Macao was controlled by Portugal until 1999, when the sovereignty of the region was returned to China.

[42] *See* XIAN FA art. 31 (1982, amended 2004) (P.R.C.). In addition, under the Basic Law of Hong Kong Special Administrative Region and the Basic Law of Macao Special Administrative Region, the existing legal systems in these two regions remain unchanged for fifty years after the handover.

legal system has Portuguese origins. Although the mainland and Macao may share certain civil law traditions within their legal systems, the law clearly differs. Given this reality, a notable characteristic of interregional conflict of laws in China, therefore, is the conflict among multiple legal systems.

To reflect this reality, foreign contract classification in China is extended to include contracts that have Hong Kong or Macao elements. Only in this regard would the term "foreign" be used to mean "jurisdiction-based sovereignty" rather than "territory-based sovereignty," and the choice of law rules governing foreign contracts will analogically apply. Note, however, that although Hong Kong and Macao are deemed foreign in the context of choice of law, some special arrangements are being made in order to facilitate smooth business transactions and intimate civil relations between the mainland and the SARs.[43]

It should be pointed out that compared with interstate conflict of laws in other countries with a federal system, the interregional conflict of laws in China bears its own distinctions. The most striking one is that the SARs are structured under the notion of "one country with two systems," meaning the socialist system on the mainland will not be practiced in the SARs. As a result, the differences in laws between the mainland and the SARs are necessarily intertwined with the different social systems (e.g., socialism v. capitalism). Another distinction worthy of mention is the fact that both the mainland and the SARs each have their own supreme court—the highest judicial body—and they are all equal in terms of authority. To put this another way, the Supreme People's Court of the mainland has no power over the courts in the SARs.[44]

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[43] Currently, there is no separate set of rules governing conflict of law issues involving Hong Kong and Macao, but there are a few issue-specific arrangements between the judiciaries. For example, on December 30, 1998, the Supreme People's Court issued "*The Arrangements for the Mutually Entrusted Service and Service of Process in Civil and Commercial Matters between the Mainland and Hong Kong Special Administrative Region.*" The Arrangements apply to Hong Kong only.

[44] Both Hong Kong and Macao have adopted a "Basic Law" that functions as a constitution for the regions. One significant provision in the Basic Law is to grant the Regions the power of final adjudication. For example, Article 19 of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Basic Law") provides:

> The Hong Kong Special Administrative Region shall be rested with the independent judicial power, including that of final adjudication. The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

XIANGGANG JI BEN FA art. 19, *available at* http://www.info.gov.hk/basic_law/fulltext/content0202.htm (last visited Jan. 18, 2006). An interesting example that may illustrate the

Thus, if a contract that is concluded in the mainland is to be performed in Hong Kong or Macao, or vice versa, choice of law would necessarily become an issue. The different legal systems together with the different social systems between the mainland and the SARs would complicate the determination of governing law for the contract. For example, since the mainland differs sharply from either Hong Kong or Macao,[45] a contractual right lawfully acquired in the SARs may not necessarily be recognized in the mainland although the acquisition of such rights took place within the territory of the country.[46]

C. Application of Foreign Law

A direct result of the application of a nation's choice of law rules on a contract is that the contract in whole or in part may be governed by a foreign law or the law of a foreign country. In conflict of laws theory, it has long been debated why courts should ever apply foreign law.[47] Scholars never seem to reach a consensus on this matter because of concerns regarding the forum's legislative power. The fundamental question is how such power could be abdicated by allowing the application of a foreign law.[48]

For a period of time after 1949, no foreign law was applied in the people's courts in China. The dominant theory was that judicial sovereignty is absolute and should not yield to any foreign jurisdiction. One possible rationale for this theory was, perhaps, a fear of "foreign influence."[49] The cause of such fear came from at least two sources. On the one hand, there was the belief that laws in different countries were mutually exclusive and that no domestic court would directly apply a foreign law.[50] On the other hand, there had long existed a bias against

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special status of Hong Kong and Macao is that going to Hong Kong or Macao from the mainland is deemed as going abroad, for which immigration and customs controls are imposed.

[45] In mainland China, the State controls almost all pillar industries in the form of either state owned enterprises or state-controlled shares; this is not the case in Hong Kong or Macao. Also, in Macao, gambling is legal, but in mainland China, gambling is prohibited.

[46] A United States-type "full faith and credit clause" does not seem suitable to deal with law conflicts between the mainland and the SARs in China.

[47] *See* SHREVE, *supra* note 22, at 22 (citing FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1997) (2nd prtg. 2003)).

[48] *See* SHREVE, *supra* note 22, at 22–23.

[49] *See* LI HAOPEI, SELECTION OF LI HAOPEI ARTICLES 5–9 (2000).

[50] In China, the controlling thought for a long time was that all laws are "class-based" and could be divided into two primary groups: the laws of the capitalist class and the laws of the proletarian (or socialist) class. There was a well-settled principle that no capitalist class laws or rules should be applied or even recognized in China. Under Chairman Mao's "class struggle" theory, the law represented and served the will of the dominating class of a given country, and different dominating classes in different countries had different interests that

western countries that were perceived to possess a constant desire to move China away from communism.[51] Such a bias reached its peak in China during the Cultural Revolution (1966–1976), when everything associated with western countries had to be destroyed.

The "foreign influence" syndrome seems to have become less acute in China since the nation started to move closer to the rest of the world both economically and socially in the 1980s. Ever since foreign investments flooded in,[52] business transactions with foreign countries have become an indispensable part of the Chinese economy. An unavoidable consequence of business interactions with foreign countries is the occurrence of "foreign" civil disputes, to which the special attention of the people's courts was called, and a great deal of which involved contracts. In response, all people's courts at the intermediate level or above have designated civil divisions to handle foreign cases.[53] In addition, given their complexity and importance, foreign civil cases that were deemed significant could be commenced at the intermediate people's courts, as opposed to a lower level court.[54]

Accompanying the influx of foreign cases in the people's court is the perceived possibility or need to apply foreign laws in China. Many Chinese private international law scholars share the idea that the application of foreign law in a domestic court produces two results: direct application of foreign law (adjudication of cases on the basis of foreign law) and indirect application of foreign law (recognition of rights acquired under foreign law).[55] In either case, it is suggested that to apply foreign law grants the foreign law an "extraterritorial effect."[56]

With regard to the reason for the application of foreign law, many

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could not be surrendered to each other.

[51] During Mao's era, a very influential ideology prevailed which espoused the idea that the socialism adopted in China and in a few other countries was red (which was good), and that all capitalism was white (which was equivalent to evil).

[52] By the end of 2004, the Foreign Investment Enterprises (known as FIEs) in China reached over 500,000 in number, and the accumulated total direct foreign investment exceeded $562.1 billion. *See* The Ministry of Commerce of China Statistics, *available at* http://www.mofcom.gov.cn/aarticle/tongjiziliao/v/200502/20050200357118.html.

[53] In the Supreme People's Court, for example, the Fourth Civil Division is designated to adjudicate civil cases that have foreign elements, including Hong Kong or Macao elements. Of course, most of the cases going to the Supreme Courts are appeals.

[54] People's courts in China operate in four different tiers: trial courts (basic level), intermediate courts, higher courts and the Supreme People's Court, representing county, prefecture, provincial and national levels, respectively. For general information about Chinese people's courts' jurisdiction, see Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 61 (2002).

[55] *See* LI SHUANGYUAN, PRIVATE INTERNATIONAL LAW 8–13 (2d ed. 2001).

[56] *See* YU XUANYU, CONFLICT OF LAWS 89–90 (1999).

western conflict-of-law theories are well received (or discussed) in China. In fact, some of them are very influential.[57] It is important to note, however that China is a country where people would prefer to apply laws and rules that could be claimed as their own. A very popular term used in China is "Chinese characteristic," meaning something which is "unique" to China or "distinct" from any other country.[58] As applied, this term has transformed into a stereotype, if not a psychological conception, that China is willing to take advice from others but will not simply follow that advice without adapting it to the Chinese reality.

Against this background, while attempting to develop a Chinese school (or doctrine) of private international law, scholars in China have been exploring new grounds to explain why foreign law should be applied in the forum court. Since contract law is deemed the area where choice of law issues arise not only in the most complicated ways but also with a high recurrence,[59] Chinese scholars have devoted much of their efforts to this area in an attempt to develop a new theory for the application of foreign law.

Keep in mind, however, that like many civil law countries, scholars in China have a tendency to emphasize principles on which a legal theory is or should be premised before the theory is addressed.[60] Choice of law in contracts is no exception. There are two principles that are acclaimed by a majority of Chinese private international law scholars as fundamental to the application of foreign law. The two principles are "national sovereignty" and "equality and mutual benefits." The national sovereignty principle seems somewhat elusive or abstract because it is rarely applied to choice of law issues. The equality and mutual benefit principle, however, has been widely employed. In fact, this principle has even been regarded as the cornerstone that enabls the courts to apply foreign law in China.[61]

III. CHINESE CHOICE OF LAW THEORIES—EVOLUTION AND

[57] For example, Huber and Story's "Comity" theory, Beale's "Vested Right" doctrine, Savigny's "Seat of Relationship" dictum, Reese's "the most significant relationship" approach, and Currie's new thinking of "Government Interest Analysis" are all widely discussed in Chinese private international law literature.

[58] This term is also used politically in China to describe the direction that the nation is moving under the control of the communist party as "socialist road with Chinese characteristic."

[59] As noted, the first piece of legislation containing choice of law rules in modern China is one that deals with contracts, namely the 1985 Foreign Economic Contract Law (which was later replaced by the Contract Law in 1999).

[60] This phenomenon can be easily spotted by simply glancing over any Chinese books on private international law. Interestingly, it seems to have become a convention that a private international law book begins with a trilogy of definition, scope and principles.

[61] *See* SHUANGYUAN, *supra* note 55, at 160–61.

DOCTRINES

Choice of law is indeed the most controversial area in conflict of laws or private international law. Almost all conflict of law theories have, more or less, to do with approaches to the choice of law question. The reasons attributable thereto are many, but there are two reasons that seem to be the most important and self-explanatory. First, choice of law directly involves the extraterritorial effects of law because a likely result of a choice of law determination is the application of foreign law in the forum country's courts. There must exist grounds to justify the application of foreign law but scholars are widely divided on what these grounds should be.

Second, even though the application of foreign law is justifiable, there is a lack of generally-accepted standards under which the applicable law is to be determined. In many cases, therefore, the choice of law issue is actually dealt with under different approaches on a forum-by-forum basis. In the United States, for instance, in 2004, among fifty states plus the District of Columbia and Puerto Rico, eleven states applied the traditional choice of law approach to contracts, twenty-four states followed the relationship-focused approach, and seventeen adopted other approaches. [62]

As noted, no cognizable school of Chinese private international law has yet emerged.[63] In fact, the development of private international law in China, at least from a doctrinal viewpoint, began with the introduction of foreign choice of law theories to the nation.[64] Each of the theories introduced, however, was criticized in China in a unique way. For example, German scholar Savigny's "Seat of Relationship" doctrine was deemed by many Chinese scholars as "lacking of [a] clear indication of [the] proper way to solve conflict of law problems" because the "seat" does nothing more than to overly simplify complicated legal relations.[65] Also, the means espoused by the Second Restatement of Conflict of Laws, namely "the most significant relationship" approach, seemed to be the most acceptable choice of law theory in China, but the approach was criticized as being too flexible to make the results predictable and certain,[66] not to mention that some have regarded this approach as a forum-oriented one.[67]

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[62] *See* Symeonides, *supra* note 255.

[63] *See* LI SHUANGYUAN, GENERAL COMMENTARY ON CHINESE PRIVATE INTERNATIONAL LAW, UNIVERSITY TEXTBOOK SERIES 447–51 (1996).

[64] *See* DEPEI, *supra* note 28, at 58–61; *see also* LI WANG, NEW COMMENTARIES ON PRIVATE INTERNATIONAL LAW 57–58 (2001).

[65] *See* DEPEI, *supra* note 28, at 42–43. Some even described Savigny's "Seat" as "an illusive or constructive connecting point" trying to determine applicable law. *See* LI SHUANGYUAN, UNIFICATION PROCESS OF CHINA AND PRIVATE INTERNATIONAL LAW 42–43 (2d ed. 1998).

[66] JIN, *supra* note 35, at 119–22.

[67] *See* DEPEI, *supra* note 28, at 50–51.

While criticizing foreign choice of law theories, many scholars in China have tried to develop "Chinese doctrines." To that end, they divided choice of law issues into two categories: choice of law foundation and choice of law methods.[68] The foundation aspect deals with the question "why," that is, why to apply a foreign law, and the methods aspect concerns itself with "how," namely, how to determine the applicable law.[69]

A. Grounds for Application of Foreign Law

It is fair to say that in the last two decades, there has been a substantial change in China in its attitude towards application of foreign law. In short, the change can best be described as going from sovereignty-sensitive (or politically-based)[70] exclusion of the application of foreign law to reform-served openness regarding the application of foreign law.[71] At present, it is not offensive to have foreign law applied in the people's courts[72] but the reasons to support their application vary.

Chinese scholars seem to be unwilling to accept any of the theories that are popular in the West, but would rather believe that globalization of the world economy has made it necessary to redefine or restructure the theories on why foreign law should be applied. Quite a number of Chinese scholars have turned their attention to "mutuality" and "universality," which they believe are the main themes in today's international relationships among countries.[73]

Conceptually, many Chinese scholars often differentiate these theories from their counterparts in the West (the United States in particular) by labeling the latter as pragmatic. Although Chinese scholars do not describe the theories as too theoretical, they do believe that theories are something much more important.[74] A traditional pattern of Chinese thinking requires one to first develop a good theory and then to guide the practice by applying it. It may be argued that this pattern of thinking had been broken

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[68] *See* SHUANGYUAN, *supra* note 63, at 37–38.

[69] *See id.* at 38.

[70] It is rooted in the fear that the application of foreign law would adversely affect the nation's sovereignty, both political and judicial.

[71] *See* JIN, *supra* note 35, at 161–69; *see also* LIU XIANGSHU, STUDY ON BASIC PROBLEMS OF PRIVATE INTERNATIONAL LAW 37–40 (2001).

[72] Although as of today there has not been a single case where a particular foreign law was applied by a people's court, there are many cases where the effect of foreign laws has been recognized by the people's courts either through affirming the rights acquired under foreign laws or by way of recognizing and enforcing foreign judgments.

[73] *See* LI SHUANGYUAN, THE DIRECTION OF PRIVATE INTERNATIONAL LAW IN 21ST CENTURY 8–34 (1999). *See also* XU DONGGEN, TRENDS IN PRIVATE INTERNATIONAL LAW 126–29 (2005).

[74] This in part might be the natural product of the civil law tradition under which the black letter rule is formed and well respected.

by Deng Xiaoping's pragmatic ideology known as the "cat theory,"[75] but still, this tradition remains strong and influential, at least among scholars.

At this point in time, there seems to be no dominant theory to justify the application of foreign law in China. In addition, none of the theories proposed have reached a point where its contents are well defined and explicitly stated. But what is clear is that all of the theories proposed do have an international focus. In this regard, criticism has been raised in China against U.S. conflict of law approaches, specifically on grounds of their being parochially based. This is because the United States approaches the center on interstate conflicts of law rather than on international conflicts of law.[76]

1. Equality and Mutual Benefits Doctrine

Many people in China believe that as a result of cross-border business transactions, a resolution of the choice of law issue becomes necessary, makeing application of foreign law conceivable.[77] Therefore, the more frequently business transactions between countries take place, the more likely that the law of one country will be applied by the court of the other (i.e., the forum country).[78] This belief is underscored by the proposition that nations in the international community mutually exist with equal sovereignty and application of foreign law by a national court is premised on mutual benefits (or reciprocity).[79] It is argued that equality and mutual benefits should be grounds for the application of foreign law because the extraterritorial effect of foreign law may only be realized with the consent of the forum nation, which must be mutual.[80]

In addition, under the equality and mutual benefits doctrine, application of foreign law is one of the key factors for the existence of conflict of law rules.[81] It is commonly held in China that conflicts of law occur as a combined consequence of four basic elements: (a) differences in laws and the legal systems of different countries, (b) indispensable civil relations and business transactions among the countries, (c) granting of civil status to foreigners (both natural and legal persons) by the forum country, and (d) recognition of the extraterritorial effects of foreign laws in civil and

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[75] The "cat theory" came from Deng Xiaoping's famous slogan, which reads "A cat is good as long as it catches mouse no matter whether the cat is white or black in color."

[76] Scholars from Europe also share the same opinion about United States conflict of law literature. For general comments in this regard, *see* Mathias Reinmann, *Parochialism in American Conflict of Laws*, 49 AM. J. COMP. L. 369, 380 (2001).

[77] *See* DEPEI, *supra* note 28, at 90.

[78] *See* DONG LIKUN, PRIVATE INTERNATIONAL LAW 8–9 (2d ed. 2000).

[79] *Id.*

[80] *See* SHUANGYUAN, *supra* note 63, at 42–43.

[81] *Id.*

commercial matters.[82] It is further asserted that the extraterritorial effects of foreign law are recognized under certain conditions, the most important of which is mutuality, i.e., mutual recognition.[83]

It seems that the equality and mutual benefits doctrine tries to explain why foreign law should be applied in a court of the forum country by emphasizing both the equal status and interests of the countries involved. The foundation of this doctrine is that no country is obligated to recognize the extraterritorial effects of the laws of any other country, but for the sake of benefiting the civil or commercial relations created and the parties involved, application of foreign law on a mutual basis may help achieve optimal results.[84] Therefore, it is necessary and possible to grant foreign law an extraterritorial effect in the forum country.[85]

An interesting question to raise regarding the equality and mutual benefits doctrine is whether mutuality would imply that the forum's application of the law of a foreign country is conditioned upon the equal application of the forum's law by a court of the said foreign country in similar or comparable cases. Many advocates of the equality and mutual benefits doctrine do not seem to be in favor of this condition and would attempt to separate the application thereof from that of a general requirement to merely cover specific cases. They take the view that mutuality is the foundation on which all choice of law issues are to be resolved, but in particular civil cases the application of foreign law is not necessarily required to be mutual.[86] In other words, mutuality is not synonymous with reciprocity (i.e., A's application of B's law is conditioned upon B's application of A's law). Diffuse reciprocity (meaning the likelihood or possibility of reciprocity) would suffice.

2. Needs of Global Business Transactions Approach

Others in China try to address the choice of law issue from the viewpoint of global business transactions. They point out that application of foreign law is essentially driven by the needs that arise in global business transactions.[87] Their argument rests on the notion that in order to maintain stable development of international economic relations and to serve the needs of business transactions involving different countries, it is necessary

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[82] *See* JIN, *supra* note 35, at 15–18. *See also* XIANGSHU, *supra* note 72, at 2–8.

[83] *See* JIN, *supra* note 35, at 16.

[84] *See* SHUANGYUAN, *supra* note 73, at 90–94. An illustration used to support this argument is that of a foreign contract. If the foreign contract is required to apply domestic law only, no foreign contract could possibly be made and consequently, no international business transactions would take place.

[85] *See* HAOPEI, *supra* note 49, at 8.

[86] *See* SHUANGYUAN, *supra* note 73, at 43.

[87] *See* ZHAO XIANGLIN, PRIVATE INTERNATIONAL LAW 5–7 (1998).

for countries to recognize and apply the law of other nations in foreign civil cases, subject to certain conditions.[88]

The "needs" approach differs from the equality and mutual benefits doctrine mainly in that the former emphasizes normal movements of business transactions while the latter focuses on mutuality. Pursuant to the "needs" approach, among the elements that cause conflict of law issues to arise, the most fundamental one concerns business transactions engaged in by people from different countries.[89] The "needs" approach seems to suggest that the application of foreign law is a natural occurrence of global business transactions and that application thereof may not have to be on a mutual basis.

Arguably, in contrast with western choice of law theories that mostly concentrate on "rights,"[90] "relations"[91] or "interests,"[92] the "needs" approach concentrates on business transactions. A logical inference under the "needs" approach would then be that as long as there are cross-border business transactions taking place, there exists the necessity to apply foreign law. On this basis, the choice of law is dependent upon the pursuit of business transactions among different countries.

3. Substantive Law Theory

Given the complexity of, and contradictions among, the existing choice of law theories, some scholars in China try to avoid the endless debates on why foreign law should be applied by advocating a so-called "substantive law theory." Aimed at promoting the direct application of governing law without many choice of law rules, the substantive law theory intends to diminish, as much as possible, the role of choice of law rules and to advance substantive law rules as the primary means to deal with foreign

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[88] *See id.* at 7. The conditions that would limit the application of foreign law include public policy and compulsory rule.

[89] *See* JIN, *supra* note 35, at 18. It is believed that without business transactions, there would be no reason to have rules regarding conflicts of law.

[90] For example, under Ulrich Huber's "comity" theory, which asserts that choice of law is necessarily dependent upon the comity of nations, "sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects." *See* Hessel Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 1, 30 (1966).

[91] Savigny's "Seat of Relationship" and the Second Restatement's "the most significant relationship" are both intended to base the selection of the choice of law on "relations." *See* Mathias Reinmann, *Savigny's Triumph? Choice of Law in Contract Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, 598 (1999); Reese, *supra* note 13, at 696.

[92] Currie's government interest analysis is an innovative effort to structure the choice of law on government interests and the policies of countries involved. For general information about Currie's approach, *see* Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 22 (1989).

civil cases.[93]

In contrast to conflict of law rules, which deal mainly with resolving the question as to which law should be applied, the substantive law rules directly apply to and affect the rights and obligations of the parties involved. To put it differently, the law is generally substantive if it is intended to regulate the transactions in question or to determine the relations between the parties rather than to simply point out how to find the applicable law. The substantive law would be either domestic law or international law (treaties and customs).

Proponents of substantive law theory criticize choice of law rules as lacking "practicability" since choice of law rules are not designed with any "governing effect" in mind.[94] They believe that unlike substantive law rules, choice of law rules are "indirect" in terms of determining the outcome of civil cases and "uncertain" in light of the expectation of the parties involved. Therefore, they raise serious doubts as to whether choice of law rules are really "rules."[95]

Under substantive law theory, although choice of law rules played an important role in the early development of conflict of laws rules, they are outdated and can hardly continue to effectively deal with conflict problems in today's arena of international business transactions.[96] It is claimed that there is a trend to replace choice of law rules with substantive law rules whereby foreign civil relations could be regulated in a more direct way.[97]

Substantive law theory seems to suggest that the only way to avoid conflict of law problems is to have as many substantive law rules as possible adopted. But in the international community, substantive law rules may only be adopted for matters on which most countries agree (or the areas in which they have common interests). This would necessarily limit the scope of viable substantive law theory. Nevertheless, it is true that substantive law rules are more extensively viewed and accepted, at least in China, as a direct means to help deal with conflict of laws issues.

B. Choice of Law Methods

Despite the fact that the debate on the application of foreign law is likely to continue, scholars in China seem to have shifted their focus to choice of law methods. There is a general consensus that the determination of applicable law in civil cases is one of the major subject matters of private

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[93] *See* SHUANGYUAN, *supra* note 55, at 160–62.

[94] *See id.* at 160–62.

[95] *See* SHUANGYUAN, *supra* note 55, at 60.

[96] *See id.* at 61.

[97] *See id.*

international law.[98] From a majority viewpoint, the determination is divided in two: direct and indirect. The indirect determination is to ascertain the applicable law through conflict of law rules, while the direct determination is simply to apply the substantive law rules. It now seems to be the case in China that private international law in the context of determining applicable law includes both conflict of law rules and substantive law rules.[99]

Furthermore, many in China maintain that conflict of law rules and substantive law rules are complementary and are both intended to serve the same goal—resolving the applicable law issue.[100] It is commonly believed in China that when international business transactions were not as developed as today, conflict of law rules were predominant in the determination of applicable law in foreign civil cases. But in today's world, the globalized economy and exponential increase in business activities makes it necessary and possible for countries to adopt substantive law rules to govern certain transactions on a mutually beneficial basis.[101]

1. Conflict of Law Rules

Although there is a growing trend in favor of substantive law rules in China, conflict of law rules are still deemed by a vast majority as a principal means to determine applicable law in civil cases with foreign elements. In fact, many in China have called for more research on conflict of law issues in order to make the conflict of law rules more meaningful to, and compatible with, the Chinese reality.[102]

In China, the term "road sign" is used as a metaphor for conflict of law rules, which means that the rules function as signals that lead to identifying and determining the laws applicable to different civil disputes. In this sense, the choice of law methods are basically the revenues prescribed by the conflict of law rules to determine the applicable law. It is believed that the primary function of the conflict of law rules is to help make a choice among the laws of the different countries involved so that a civil dispute could be

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[98] In China, private international law is generally defined to include rules determining applicable law (both choice of law and substantive law rules), rules regulating the civil status of foreigners, and rules of international civil procedures, including international arbitration rules. *See* DEPEI, *supra* note 28, at 7–9.

[99] Opponents, however, argue that the substantive law rules shall not become part of private international law because the emergence of substantive law rules does not change or alter the nature of private international law, which is primarily to resolve law conflicts. They then suggest that the substantive law rules shall be regarded as a separate and independent branch of law. *See* LIKUN, *supra* note 78, at 150–51.

[100] *See* XIANGSHU, *supra* note 71, at 56–60.

[101] *See* DEPEI, *supra* note 28, at 5–7.

[102] *See* SHUANGYUAN, *supra* note 73, at 89–105.

determined under the chosen law in a specific way.[103]

In China it is also advocated that although conflict of law rules are subject to the legislative action of a particular country or state, adoption of such rules is not made arbitrarily but instead on an objective standard. In other words, each rule has a clear goal to serve.[104] For this reason, a conflict of law rule is generally described in China as having three "attributes," namely scope, connecting point, and the law to be applied. Taken as a whole, the three attributes constitute a so-called "conflict rule formula."[105]

Once again, the "conflict rule formula" typically represents the Chinese way of thinking, namely the civil law tradition of summarizing the principles as the starting point. It also helps indicate that in Chinese jurisprudence there is not only a theory-oriented (*vis-à-vis* a pragmatism-oriented) rationality, but also a formalism-based methodology. That is to say that in China, on the one hand the theory is a governing force, while on the other hand the formalism-based methodology is predominant. All of this is perhaps a derivative product of the civil law theorem of the "black letter" rule.

Within the "conflict rule formula," the scope refers to the civil relation or civil dispute with which the conflict rule is to deal and the connecting point is the factor determining the law to be applied. An illustrative example is Article 146 of the 1986 Civil Code.[106] It provides that in determining damages for tortious conduct, courts should apply the law of the place where the tortious conduct is committed. In this conflict rule, the "scope" is "damages for tortious conduct," the connecting point is "the place where the tortious conduct is committed," and the law to be applied is "the law of the place of the tortious conduct."[107] A generic term articulated to indicate the law that is determined under a particular conflict rule is *lex causae*: the applicable law or proper law.

In contrast to conflict of law rules, choice of law methods are said to be simply the techniques or devices that help ascertain the *lex causae.*[108] It is interesting to note that scholars in China have divided choice of law methods into different categories according to the choice of law theories they each stand on, and urge courts not to stick with any single choice of law method but rather to consider exploring different methods under different circumstances.[109] The categories so divided include (a) the nature-

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[103] *See* SHUANGYUAN, *supra* note 55, at 306.
[104] *See* JIN, *supra* note 35, at 225.
[105] *See* DEPEI, *supra* note 28, at 93–103.
[106] *See* 1986 Civil Code, *supra* note 5, at art. 146.
[107] *Id.*
[108] *See* JIN, *supra* note 35, at 225.
[109] *Id.* at 109.

of-law based method,[110] (b) the legal relation or relationship based method,[111] (c) the government interests based method,[112] (d) the result or consequence based method,[113] (e) the party autonomy based method,[114] and (f) the impairment comparison based method.[115]

Clearly, those methods are imported. In this context, Chinese scholars seem to prefer flexibility to rigidity. One legitimate explanation is, perhaps, that since conflict of laws in China is in the process of evolution, there is a need in the country to take as reference the choice of law methods practiced in other countries in order to help develop the Chinese methods. Many of these methods are being incorporated one way or another into the Chinese conflict of law legislation and judicial practices.[116]

2. Substantive Law Rules

Technically, substantive law rules do not involve choice of law methods because by directly applying substantive law the applicable law is certain and there is no choice to be made. However, since the adoption of substantive law is intended to avoid or eliminate conflict and to reach a uniform result, the substantive law rules are often discussed in China together with conflict of law rules as the methods to resolve law conflicts.[117] Bboth have the same function—regulation of foreign civil or commercial relations.[118]

As suggested by Chinese private international law scholars, the substantive law rules contain two types of rules: uniform international rules, and the rules in the domestic law. The uniform international rules are those that directly provide the rights and obligations of parties in civil or commercial relations. These rules take the form of international treaties or

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[110] This method is derived from Bartolus' statute approach under which the laws according to their nature are classified as personal law and law of things. *See* SHREVE, *supra* note 22, at 8–10; WILLIS REESE, CONFLICT OF LAWS, CASES AND MATERIALS 4 (8th ed. 1984); CRAMPTON, *supra* note 24, at 2–3.

[111] It includes both Savigny's "seat of relations" and the Second Restatement's "the most significant relationship" doctrines. *See* SHREVE, *supra* note 22, at 17–20, 155–188.

[112] The interest-based choice of law method is deemed the product of Currie's "government analysis" approach. *See* Currie, *supra* note 21.

[113] David Covers' seven principles of preference for the solution of choice of law problems are classified as "result-selecting" choice of law methods. It also includes the approach that focuses on the ease of recognition and enforcement of the judgment. *See* SHREVE, *supra* note 22, at 49.

[114] It is essentially choice of law by the parties.

[115] This method is premised on Baxter's "comparative impairment" approach. *See* WILLIAM BAXTER, CHOICE OF LAW AND FEDERAL SYSTEM, 16 STAN. L. REV. 1 (1963).

[116] *See* JIN, *supra* note 35, at 172–73.

[117] *See* DEPEI, *supra* note 28, at 90–92.

[118] *See* SHUANGYUAN, *supra* note 55, at 47–51.

customs and are directly applicable to the matters they are designed or intended to cope with.[119] The 1980 United Nations Convention on Contracts for the International Sale of Goods ("CISG")[120] is a typical international treaty containing substantive law rules that govern contracts for the international sale of goods.[121]

The domestic substantive law rules are the rules that apply exclusively to foreign civil or commercial matters and in many cases the application of such rules is mandatory. Mandatory means that the domestic courts must apply the rules when hearing the case and a foreign judgment that is deemed to have violated these rules will not be recognized and enforced. There has been a debate over whether domestic substantive law rules should be included in private international law, but many in China strongly believe and advocate that because these rules are aimed at regulating foreign civil relations, they necessarily become part of private international law.[122]

IV. CONTRACTUAL CHOICE OF LAW: PARTY AUTONOMY—A WESTERN CONCEPT WITH CHINESE VARIATIONS

Contracts are perhaps the frontier where the conflict of law rules develop. This is not only because contracts involve the most complex and confusing area of the choice of law problems,[123] but also because the multiple perspectives of contracts create numerous issues that call for vastly diverse choice of law rules. In China, the modern conflict of law legislation actually began with choice of law in contracts and many conflict of law theories are examined and discussed using contracts as a threshold.

Note, however, that contracts in China were not a major component of business transactions until 1979[124] and a Chinese citizen, as an individual, may not become a party to a foreign contract even under the 1985 "Foreign Economic Contract Law"—the first contract legislation where choice of law

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[119] In this regard, both international treaties and customs are viewed in China as the sources of private international law.

[120] *See* United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, S. TREATY DOC. No. 9 (1983), 19 I.L.M. 671, *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf [hereinafter CISG].

[121] The United States and China both ratified the CISG in 1986. According to the website of the United Nations Commission on International Trade Law (UNCITRAL), as of 2005 the number of State parties to the CISG was sixty-six. UNCITRAL, Status, http://www.uncitral.org/ uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Jan. 18, 2006).

[122] *See* YAO ZHUANG, THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW 6–7 (1992). *See also* SHUANGYUAN, *supra* note 55, at 50.

[123] *See* WEINTRAUB, *supra* note 11, at 438.

[124] Before 1979, China was a centrally planned economy in which all business sectors were strictly tied to the State economic plan and the development of the economy was not driven by market force but rather by the government's pre-determined plan.

rules were provided.[125] It was the case in the early legislation that foreign contracts in China were treated separately from domestic contracts and were regulated by a special law.[126]

With regard to choice of law, it is discernable that the law governing contracts in China is drafted in a way that bears a certain resemblance to the laws of foreign countries. For example, under Article 5 of the 1985 Foreign Economic Contract Law, the parties to a contract may choose the law to be applied to the settlement of disputes arising from a contract. In the absence of such a choice by the parties, the law of the country that has the closest connection with the contract applies.[127] This provision was obviously a Chinese version of the party autonomy principle that originated in the West. But the underlying rationale and the implication of the choice of law rules for contracts are clearly embedded with Chinese distinctions.

A. Party Autonomy and Its Application

It has become a universal principle that the parties to a contract should have the power to select the law which is to govern the contract—the principle known as "party autonomy."[128] Premised on the freedom of contract, party autonomy in essence grants the parties the freedom to decide through their agreement the law applicable to the contract.[129] The fundamental ground supporting this principle is that since a contract involves all voluntary obligations and the contractual parties have the right to choose whether or not they will be bound, they should also have the right to choose the law by which they will abide.[130]

Unfortunately, neither the concept of freedom of contract[131] nor the party autonomy principle[132] were accepted in China until recent years. Even in 1985, when the Foreign Economic Contract Law was promulgated, the contractual parties who were allowed to choose the applicable law did

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[125] Article 2 of the Foreign Economic Contract Law provided that this law applies to economic contracts concluded between enterprises or other economic organizations of the People's Republic of China and foreign enterprises, or between other foreign economic organizations or individuals (except for international transportation contracts). *See* Law on Economic Contracts Involving Foreign Interest, *supra* note 4.

[126] This phenomenon ended in 1999 when the Contract Law of China was adopted.

[127] *See* Law on Economic Contracts Involving Foreign Interest, *supra* note 4.

[128] *See* MORRIS, *supra* note 12, at 321.

[129] *See* Hessel Yntema, *The Historical Bases of Private International Law*, 2 AM. J. COMP. L. 297, 304–05 (1953).

[130] *See* Beale, *supra* note 10, at 7.

[131] For a general discussion about the acceptance of freedom of contract in China, *see* Mo Zhang, *Freedom of Contract with Chinese Legal Characteristics: A Closer Look at China's New Contract Law*, 14 TEMPLE INT'L & COMP. L.J. 237, 241–46 (2000).

[132] *See* SUN LIHAI, SELECTION OF LEGISLATIVE MATERIALS ON THE CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA 8–10 (1999).

not include Chinese citizens. Although in the 1986 Civil Code the principle of the parties' choice of law in contracts is reiterated, the application of the Foreign Economic Contract Law had limited the ability of Chinese citizens to make contracts with foreign parties. It was not until the adoption of the Contract Law in 1999 that Chinese citizens were able to become parties to a foreign contract.[133]

There are numerous reasons for China's denial of, or resistance to, freedom of contract. First, for several decades after the People's Republic was founded, the country was structured on the Soviet model of a centrally planned economy under which it was impossible for individuals or business entities to have free access to the market. Every business sector was strictly tied to the State's economic plan and development of the economy was not driven by market forces but by the central government through pre-determined plans.[134] Second, because the State plan was the dominant player in China's economy, there was barely any room for freedom of contract in business transactions. Third, freedom of contract had long been criticized in China as a capitalist concept and therefore an "enemy" to the socialist system.

Economic reform, however, has changed the country dramatically. On the one hand, the nation's economy is moving from a planned economy to a market-oriented one, and market forces are taking the position of the state plans in many sectors. On the other hand, individuals are thinking more about their own rights in business transactions. The 1999 Contract Law has a provision under which the principle of party autonomy was meaningfully accepted in China as a principle of choice of law in contracts. Still, acceptance is subject to certain limitations.

1. Freedom of Choice of Applicable Law

The basic choice of law provision representing party autonomy in China is Article 126 of the Contract Law,[135] which provides that the parties to a foreign contract may choose the law to be applied to the settlement of their disputes arising out of the contract, except as otherwise stipulated by law.[136] For discussion purposes, the Article 126 provision may be regarded

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[133] Under Article 2 of the Contract Law a contract refers to "an agreement that creates, modifies and terminates the civil rights and obligations between natural persons, legal persons or other organizations with equal status." *See* Contract Law of the People's Republic of China, *supra* note 6.

[134] This type of economy was modeled after the former Soviet Union, described as "bird-cage economy," which was advocated by late Chinese vice premier Chen Yun. Mr. Chen was in charge of the nation's economy for decades except for the period of the Cultural Revolution.

[135] *See* Contract Law of the People's Republic of China, *supra* note 6, at art. 126.

[136] *See id.*

as containing two clauses: the party autonomy clause and the exception clause. It is believed that the main theme of Article 126 is to empower the contractual party to select the governing law at will as long as the "exception clause" is not triggered.[137] Scholars argue that there are at least two benefits to having parties choose the governing law for the contract: first, it enables the parties to predict the possible outcomes of their conduct and activities, and consequently will help maintain the stability of their legal relations; and second, it facilitates the settlement of disputes because the parties have already agreed to the law applicable to any disputes that may arise.[138]

There is no doubt that Article 126 upholds party autonomy but the provision itself is unclear on several issues related to the contractual choice of law. The gap is then left to the Supreme People's Court to fill by judicial interpretation. It should be noted that in order to implement the 1985 Foreign Economic Contract Law, the Supreme People's Court, in October 1987, issued "The Answers to Questions about Application of the Foreign Economic Contract Law of China" ("Answers").[139] Although the Answers was repealed after the Foreign Economic Contract Law was replaced by the Contract Law in 1999, many opinions in the Answers nevertheless remain influential and have a strong effect upon the Chinese people's courts.[140]

The first issue is the scope of the parties' autonomy, or what should be governed by the law chosen by the parties. Article 126 defines the scope as covering "disputes arising out of the contract."[141] This seems quite self-explanatory, but it is in fact problematic because disputes in contract law can be very broad in terms of range. By referring to the Answers,[142] many believe that the parties' choice of law shall apply to such disputes as the conclusion of contract, time of conclusion, interpretation of contract, performance of contract, obligations for breach of contract, as well as modification, suspension, assignment, dissolution or termination of contract.[143]

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[137] *See* LI GUOGUANG, EXPLANATION AND APPLICATION OF THE CONTRACT LAW 527 (1999). This book was actually written by a group of judges in the Economic Case Trial Division of the Supreme People's Court and the opinions in the book necessarily reflect the position that the judges take in trials.

[138] *See* SHUANGYUAN, *supra* note 55, at 527.

[139] *See* SUPREME PEOPLE'S COURT, THE ANSWERS TO QUESTIONS ABOUT APPLICATION OF THE FOREIGN ECONOMIC CONTRACT LAW OF CHINA (1987) [hereinafter 1987 ANSWERS].

[140] *See* GUOGUANG, *supra* note 137, at 528.

[141] *See* Contract Law of the People's Republic of China, *supra* note 6.

[142] *See* 1987 ANSWERS, *supra* note 139.

[143] *See* JIN, *supra* note 35, at 423. In the United States, party autonomy is generally viewed as a rule to give the parties to the contract the power to choose the law to govern the validity of the contract (*see* WEINTRAUB, *supra* note 11, at 445–47), or in the words of the Second Restatement, to govern their contractual rights and duties (*see* RESTATEMENT

The scope of party autonomy may appear extensive but there are two areas that do not seem to fall within its scope. One area is the capacity of the parties to make a contract. Many argue that contractual capacity is essentially the capacity for civil conduct and shall be determined by the personal law, namely the law of the place of residence or nationality of the person. The authoritative source in support of this argument derives from the 1986 Civil Code. Under Article 143 of the Civil Code, if a Chinese citizen resides permanently in a foreign country, in determining his capacity for civil conduct a Chinese court may apply the law of the country of his permanent residence.[144] This provision is deemed to have the effect of taking the matter of contractual ability out of party autonomy.[145]

The other area involves the formality of contract. A controlling doctrine is that the law where the contract was made governs the formality of a contract.[146] There is a belief that the Contract Law has special requirements for formality which must be met for a contract made in China. Pursuant to Article 10 of the Contract Law, a contract may be made in written, oral or other forms, but if writing is required by law or agreed upon by the parties, the contract must be made in writing.[147] More importantly, for certain contracts, government approval is also required.[148] Therefore the question as to compliance with formality requirements would affect the validity of the contract concluded in China, and such requirements may not be avoided by choosing a foreign law as governing law.[149] Perhaps due to the concern about the contract formality requirements, when joining the CISG, China made a reservation concerning Article 11, under which writing is not required for a contract for sale of goods.[150]

(SECOND) OF CONFLICT OF LAWS § 187 (1969)).

[144] *See* 1986 Civil Code, *supra* note 5, at art. 143. However, the Supreme People's Court interpreted the application of this provision narrowly. According to the Supreme People's Court, with regard to a Chinese citizen who is a permanent resident of a foreign country, his capacity for civil conduct may be determined by the law of the country of his residence if the conduct is performed within that country, but if the conduct is performed in China, Chinese law shall apply. An exception to this rule is that if a foreigner who conducted civil activities in China is lacking civil capacity under the law of his home country, but has such capacity under Chinese law, he shall be deemed to have civil capacity. *See* 1988 Opinions, *supra* note 8, at arts. 179–80.

[145] *See* GUOGUANG, *supra* note 137, at 528.

[146] The doctrine is normally called the rule of *locus regit actum*, which means that when a legal transaction complies with the formalities required by the country where it is conducted, it is also valid in the country where it is to be given effect. DEPEI, *supra* note 28, at 203.

[147] *See* Contract Law of the People's Republic of China, *supra* note 6, at art. 10.

[148] *Id.* at art. 44.

[149] *See* Zhang, *supra* note 131, at 251.

[150] Article 11 of the CISG provides that "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." CISG, *supra* note 120, at art. 11.

The second issue deals with the way or means by which the parties make the choice of law. It is required in China that the choice of law be express. The parties' intention regarding the governing law of their contract may not be assumed through interpretation of the terms of the contract or by looking at an established course of dealing between the parties. For example, an arbitration agreement or the choice of forum clause made by the parties may not be used to infer the intent of the parties with regard to the governing law. It is true that the Contract Law is silent about how a choice of law should be made, but the requirement for an express choice of law has become a well-settled judicial rule in determining of the validity of the choice of law by the parties to a contract,[151] since it was stipulated by the Supreme People's Court in 1987.[152]

The third issue concerns the time at which the parties shall select the law applicable to their contract. The time is relevant because it may affect the effectiveness of the choice. In many countries, the parties shall make the decision in the form of a choice of law clause at the time the contract is made; otherwise the parties shall be deemed to have not chosen the applicable law unless some other manifestation of their intention of the choice could be ascertained.[153] If the parties are found to have not made a choice, the governing law will then be determined by other standards prevailing in the forum country or state.

By contrast, a flexible approach is being taken in China with regard to the timing of the parties' choice. Thus, the choice could be made either by a choice of law clause in the contract or by a separate choice of law agreement. However, under the Supreme People's Court's opinion, the parties may make the choice at the time the contract is made, at a time after the dispute arises, or even right before the court hearing is conducted.[154] This flexibility certainly grants the parties more freedom in terms of the time to make a choice.[155] The idea is that since there is a restrictive formality requirement, as a trade off, the parties shall be given more time to

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[151] This rule is now facing criticism because of its "rigid" nature. The critique asserts that pursuant to the party autonomy principle, any choice is permissible as long as it reflects the will of the parties. That will may not have to be expressed in all cases, but rather it may be assumed or implied under certain circumstances. JIN, *supra* note 35, at 424.

[152] *See* 1987 ANSWERS, *supra* note 139.

[153] *See* MORRIS, *supra* note 12, at 238–39; *see also* WEINTRAUB, *supra* note 11, at 445–46.

[154] *See* GUOGUANG, *supra* note 137, at 528.

[155] Some critics say that the Supreme People's Court's opinion is not clear as to whether the parties may make their choice after the contract is made. JIN, *supra* note 35, at 423–24. But others argue that the Supreme People's Court's opinion in fact allows the parties to make choices at any time during the period between the time of contract and the time of court hearing. *See* GUOGUANG, *supra* note 137, at 528.

make up their mind.[156]

What is uncertain, however, is whether the parties may change the governing law they previously chose by a later agreement. Neither the Contract Law nor the Supreme People's Court has said anything regarding this. The key point is that the change, if allowed, may prejudice the formal validity of the contract as well as the interests of third parties because the subsequent choice is deemed retroactively effective to the time when the contract was made.[157] Obviously, the formal validity concern has little relevance in China because, as noted, this matter is not governed by the law chosen by the parties, but rather by the law of the place of contract. As far as third party interest, many suggest that the change of choice of law by the parties be permitted but may not adversely affect the rights of third parties.[158]

The fourth issue is related to the law chosen by the parties. There is no question that the law so chosen could be either Chinese or foreign law. To be more specific, this is an issue about whether the law chosen by the parties to a contract may include the conflict of law rules. Once again, there is no clear legal provision, but the Supreme People's Court is of the opinion that the law chosen by the parties is the substantive law, excluding both the conflict of law rules and the procedural laws.[159] The purpose is obviously to avoid the issue of *renvoi*.[160]

One last point of importance is that in China neither the Contract Law nor the Supreme People's Court interpretations have separated the validity of contract from other contract issues with regard to the governing law chosen by the parties. Although the capacity and formality issues indeed involve the validity of the contract, validity in China is generally viewed as no different from other issues of the contract when the applicable law is to be determined. The same notion is also applied to the determination of applicable law absent the parties' choice.

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[156] *See* SHUANGYUAN, *supra* note 55, at 527.

[157] Lando, *supra* note 14, at 52.

[158] A good example is the Model Law. Article 100 of the Model Law provides that the parties to a contract may choose the applicable law at the time the contract is made, at the time after the contract is made, or at the time before the court hearing is commenced; the parties, at the time after the contract is made, may also change the law chosen at the time of contract. The change, if made, shall have a retroactive effect but shall not adversely affect the rights of third parties. MODEL LAW, *supra* note 9.

[159] *See* DEPEI, *supra* note 28, at 203; *see also* GUOGUANG, *supra* note 137, at 528; *see also* JIN, *supra* note 35, at 425.

[160] "'*Renvoi*,' meaning refer back or refer away, occurs when the forum applies a foreign choice of law rule that selects law different from that chosen by the forum's rule." *See* WEINTRAUB, *supra* note 11, at 88.

2. Statutory Restrictions

It is a universal maxim that the party autonomy is not absolute, and the freedom of the parties to select the governing law for their contract is subject to statutory limits. The imposition of restrictions upon the parties in their choice of law is a necessary device to safeguard the legislative and judicial interest of the state involved. In one respect, by limiting the parties' freedom of choice, the country will make sure that application of foreign law will not be made at the expense of a forum's interests. In the other respect, for certain types of matters to which the application of the law of the forum country cannot be excluded by a contractual term, the limitation on the parties' choice will certainly serve this need. Of course, the degree of the restriction varies from country to country.

Because of the non-absolute nature, the party autonomy doctrine finds its home in China. The tolerance of the government to the adoption of party autonomy in the Contract Law rests in the belief that there is plenty of room for the government to impose restrictions whenever it sees fit. Thus, allowing party autonomy in China would serve a two-fold purpose: to underscore governmental recognition of the principle of freedom of contract, which is needed during the course of economic reform, and by imposing restrictions, the government will sustain as much control as possible. Perhaps for the purpose of distinguishing China from the West, only the notion, but not the term, is used in the Contract Law.[161]

In China, there are currently three major areas in which the choice of law by the parties is not permitted. The first area refers to the mandatory rules, which means that Chinese laws must be applied. Under the second paragraph of Article 126 of the Contract Law, Chinese law shall apply to the contracts to be performed in China concerning Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, or Chinese foreign cooperative exploration and development of natural resources.[162]

Thus, for these contracts, the choice of governing law other than Chinese law by the parties will be invalid and unenforceable. In addition, under the mandatory rules, the application of Chinese law is required with respect not only to the formation and validity of the contract, but also to the interpretation and performance of the contract and to dispute settlements. In short, no foreign law may touch any part of these contracts.

The second area is known as public policy reservation. It is a common practice that if the application of foreign law is found incompatible with the public policy of the forum country, the application will be excluded and the

[161] During the drafting of the Contact Law, party autonomy was used as the title for the choice of law provision, but later the term was deleted.

[162] *See* Contract Law of the People's Republic of China, *supra* note 6, at art. 126.

parties' choice will be invalidated.[163] As a result, the law of the forum will be applied instead. Essentially, the public policy reservation is a guarantee of application of forum law whenever a foreign law that otherwise would be applied is regarded to be against the public policy of the forum country.

In China, the public policy reservation is provided in the 1986 Civil Code. In accordance with Article 150 of the Civil Code, the application of foreign law shall not violate the social public interests of the People's Republic of China.[164] In its Answers, the Supreme People's Court explicitly pointed out that when the applicable law is a foreign law, the application of which would violate the basic principles of Chinese law and the social public interest, the foreign law should not be applied and the applicable law then should be Chinese law.[165]

Social public interest is not defined in either the Civil Code or the Contract Law, but it is generally understood in China to mean social morals and public order.[166] For purposes of application of foreign law, the social public interest has an elastic nature and provides the people's courts with much discretionary power to make decisions on an *ad hoc* basis.[167] For example, if application of a foreign law would adversely affect state ownership in the form of stocks or shares in a particular company, or the application would be deemed detrimental to the consumer interest, the foreign law may not be applied by Chinese people's court on the ground of social public interest.

The third area covers the good faith requirement. In China, good faith is the standard by which the actual intent or motivation of the parties is judged when they select the governing law f their contract. If the parties select a foreign law with the intent to evade Chinese law that otherwise must be applied, the parties will be found in bad faith and the selection will become void. According to the Supreme People's Court, the conduct of the parties to evade mandatory or prohibitive rules of law will produce no effect on the application of foreign law.[168]

On its face, the good faith requirement may appear to overlap with the public policy reservation and the mandatory rules but the focus of the good faith requirement is on the state of mind of the parties while the public policy and mandatory rules focus on government function. In other words, a violation of either public policy or mandatory rules does not require the intent of the parties. Good faith, however, is determined by inquiring into

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[163] Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice of Law Problem*, 37 U. KAN. L. REV. 471, 491–92 (1989).

[164] *See* 1986 Civil Code, *supra* note 5.

[165] *See* 1987 ANSWERS, *supra* note 139.

[166] *See* XIANGSHU, *supra* note 71, at 158–65.

[167] *See* GUOGUANG, *supra* note 137, at 529.

[168] 1988 Opinions, *supra* note 8, at art. 194.

what was intended by the parties. In addition, good faith would serve as grounds to invalidate the parties' choice if made under fraud or duress.[169]

One important but still unresolved issue affecting the freedom of the parties to choose the law applicable to their contract is whether the law to be chosen should bear necessary connections with the parties, transactions, or the controversies in question.[170] Apparently, there is no such connection requirement that is either provided by the law or addressed by the Supreme People's Court. Nevertheless, scholars have debated this issue.

At one end of the spectrum, it is argued that necessary connections should not be required because (a) there is a lack of such provisions in the law,[171] (b) the freedom of choice of law includes the law of any place unless prohibited by the law,[172] and (c) there is no standard as to what connection is necessary and what is not.[173] At the other end is the argument that it would be meaningless to allow the parties to choose a law that has nothing to do with the parties and the transactions. Additionally, it has become a growing practice in many other countries to require connections in the parties' choice of applicable law.[174] The argument for a connection requirement then suggests that the applicable law chosen by the parties shall generally be limited to the law of the place of the contract conclusion, the place of contract performance, the place of the objects in question, the place of the domicile of either of the parties, or the place of the citizenship of either of the parties.[175]

3. Doctrine of Dépeçage

Dépeçage, in the context of choice of law, is to allow a splitting of the contract between different legal systems. Under this doctrine, the parties

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[169] JIANG PING ET AL., A DETAILED EXPLANATION OF THE CONTRACT LAW OF LAW 6–7 (1999).

[170] In the United States, for example, one of the limitations on party autonomy in the Second Restatement is that the choice of law clause will not be effective if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1969).

[171] *See* DEPEI, *supra* note 28, at 203.

[172] *See* SHUANGYUAN, *supra* note 55, at 527.

[173] MODEL LAW, *supra* note 9, at art. 100 & cmts.

[174] *See* GUOGUANG, *supra* note 137, at 529. In the United States, many courts do require some sort of "substantial relationship" between the chosen law and the transactions. In New York, for example, it was held that the parties' intention and stipulation regarding the law governing their contract is but one factor, albeit a weighty one, in deciding the ultimate question, namely, which jurisdiction has the most significant contacts with the matter at issue. *See* Haag v. Barnes, 175 N.E.2d 441, 443–44 (N.Y. 1961).

[175] *See* GUOGUANG, *supra* note 137, at 529.

can select the law applicable to their contract in whole or in part.[176] If in part, the parties may select different laws to govern different parts of the contract. For example, the parties may select the law of country A to apply to the conclusion of the contract and the law of country B to deal with the performance of the contract.

The doctrine of *dépeçage* is accepted in the legal texts in China, though it is not found in the text of conflict of law legislation. The Model Law is a clear indication of the acceptance of this doctrine.[177] Under Article 100 of the Model Law, the parties may decide to have the chosen law applied to the whole contract, or a part or several parts of the contract. In the official comments of the Model Law, the commentators indicate that *dépeçage* is intended to give the parties more flexibility in determining the law applicable to the contact.[178] But it has been stressed that to allow *dépeçage* may create disparity of rights and obligations between the contractual parties.[179]

Although the doctrine of *dépeçage* primarily concerns the choice of law by the parties,[180] it is said to also apply when the applicable law is determined by means other than the parties' choice.[181] The Contract Law, as many have argued, has implicated *dépeçage* by limiting the parties' choice of applicable law to "the settlement of contractual disputes." The separation of the contractual capacity and formal validity from other matters of the contract has resulted in subjecting the different parts of the contract to different laws.[182]

V. APPLICABLE LAW IN CONTRACT ABSENT CHOICE BY THE PARTIES—JUDICIAL DISCRETIONARY DETERMINATION

A judicial determination of the law applicable to a contract will be called if there is no effective choice of law by the parties, that is, either no choice is made or the choice is invalid. The rules employed to make the judicial determination are complex. But it appears to be a trend that a certain degree of "connection" or "relationship" with the contract is taken as a benchmark for ascertaining the applicable law. In the United States for instance, there is an emerging consensus that in the absence of an effective choice of law by the parties, a contract should be governed by the law of the state having the most significant relationship with the parties and the

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[176] MORRIS, *supra* note 12, at 329.
[177] *See* MODEL LAW, *supra* note 9.
[178] *Id.* at art. 100.
[179] *Id.*
[180] *Id.* at art. 100 & cmts.
[181] *See* SHUANGYUAN, *supra* note 55, at 527.
[182] *Id.*

transactions, an approach advanced by the Second Restatement.[183] In Europe, under the Convention on the Law Applicable to Contractual Obligations, "[t]o the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contact shall be governed by the law of the country with which it is most closely connected."[184]

China has followed this trend by making "the closest connection" the rule for determining the applicable law absent a choice by the parties.[185] "The closest connection" is described as the modified version, or a product of the influence, of "the most significant relationship" approach of the Second Restatement.[186] But it is also claimed that "the closest connection" rule as adopted in China has surpassed the point of the Second Restatement as to the determination of the law of the country of closest connection and the certainty in identifying such law.[187]

A. "The Closest Connection" Rule in General

Both the 1986 Civil Code and the 1999 Contract Law have identical provisions for the determination of governing law for a contract when there is no choice of law by the parties.[188] Under Article 145 of the Civil Code and Article 126 of the Contract Law, if the parties to a foreign contract have made no choice, the law of the country to which contact is most closely connected shall be applied.[189] Thus, to determine the applicable law without the parties' choice, the focus is on the connection closest to the

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[183] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188; *see also* WEINTRAUB, *supra* note 11, at 458-59.

[184] *See* Convention on the Law Applicable to Contractual Obligations, art. 4, 1980 O.J. (L 26) 23.

[185] *See* Contract Law of the People's Republic of China, *supra* note 6, at art. 126.

[186] *See* DONGGEN, *supra* note 73, at 346–52.

[187] One criticism is that "the most significant relationship" approach has advantages that enable the courts to determine the applicable law, but the advantages are discounted by its consideration of seven factors and five contacts. These factors and contacts make it difficult for the courts to make decisions with certainty and predictability. *See* SHUANGYUAN, *supra* note 55, at 569. The seven factors are: (a) the needs of the interstate and international system, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. The five contacts are: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of subject matter of contract, and (e) the domicile, residence, nationality, place of corporation and place of business of the parties. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 188.

[188] *See* Contract Law of the People's Republic of China, *supra* note 6; 1986 Civil Code, *supra* note 5.

[189] *Id.*

contract.

Two points should be made with regard to the rule of "the closest connection." First, this rule gives the people's courts the discretionary power to determine which law is to be applied absent an effective choice by the parties. Since neither the Civil Code nor the Contract Law has prescribed what would be "the closest connection," the Supreme People's Court has provided guidance that is aimed at specifying situations in which the connection would be deemed closest.[190] This guidance is explained in the legal texts as one that premises the determination of the connection on the characteristic performance of the contract, discussed below.

The second point is that the judicial determination of the applicable law is supplementary in nature. In practice, the courts are generally required to make two inquiries before the judicial determination of law is pursued. One inquiry is to determine whether the parties have made a choice of applicable law in their contract and whether the choice is effective. The other inquiry is to find out whether the parties are willing to make any choice with regard to the applicable law before the court hearing begins. As noted, it is typical in China for the parties to select the governing law of their contract even before the trial.

In addition, the application of "the closest connection" rule is extended to the determination of the law of a foreign country where multiple legal systems exist. Generally, the applicable foreign law that is determined under the "closest connection" rule refers to the substantive law of the foreign country. However, if within that foreign country different laws are applied in different states, the applicable law shall be the one pointed to by the conflict of law rules prevailing in that foreign country. If there is no applicable conflict of law rules, the law of the state with which the contract is most closely connected will be applied.[191]

B. Characteristic Performance Standards

The characteristic performance doctrine focuses on the link between the contract and the social and economic environment of which the performance forms a part.[192] The characteristic is, of course, dependent upon the type of contract. To illustrate, for a sales contract, a characteristic performance is the performance for which the payment is due, that is, the delivery of goods. Therefore, the characteristic performance is denoted as the one that usually constitutes the center of gravity and the socio-economic function of the contractual transaction.[193]

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[190] *See* 1988 Opinions, *supra* note 8, at art. 192.

[191] *Id.*

[192] MORRIS, *supra* note 12, at 333.

[193] *Id.* at 333–34.

In an attempt to help make a meaningful determination of applicable law under the rule of "the closest connection," the Supreme People's Court of China accepted the idea of the characteristic performance and incorporated it into the standards set forth for the judicial determination of the applicable law.[194] The adoption of the characteristic performance-based standards by the Supreme People's Court set two goals. First, the standards will limit the discretionary power of the courts in determining the applicable law, making the determination more objective. Second and more importantly, the standards will help achieve certainty, predictability, and uniformity of the result.[195]

In order to make the standards more operable, the Supreme People's Court provided a laundry list intended to cover all major contracts (a total of thirteen contract types are on the list).[196] For example, in a contract for the international sale of goods, the law that is most closely connected with the contract is the law of the place of the seller's business at the time of contract. If, however, the contract was negotiated and concluded in the place of the buyer's business, the contract was concluded under terms provided by the buyer and as a result of the bid invitation by the buyer, or the contract explicitly provides that the seller must deliver the goods at the place of the buyer's business, the applicable law shall then be that of the place of the buyer's business.[197]

An exception to the characteristic performance standard occurs when the people's court, in determining applicable laws, finds that the contract is most closely connected with the law of another country or region. In this situation the law of that country or region shall be applied.[198] This exception is intended to give the people's courts flexibility to deal with certain special circumstances in determining the applicable law.[199] Another exception is

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[194] *See* 1987 ANSWERS, *supra* note 139.

[195] *See* JIN, *supra* note 35, at 412.

[196] *See* 1987 ANSWERS, *supra* note 139.

[197] *See id.* For other contracts, the laws determined by the people's courts under the closest connection standard shall be as follows: (a) contract for bank loan or guarantee—law of the place where the bank is located; (b) insurance contract—law of the place of insurer's business office; (c) contract for product processing and work—law of the place where the contractor's business office is situated; (d) contract of transfer of technology—law of the place of transferee's business office; (e) contract for construction project—law of the place of the project; (f) contract for technical consultation or design—law of the place where the commissioning party's business office is located; (g) contract for service—law of the place of service performance; (h) contract for supply of set equipment—law of the place where the equipment is installed and operated; (i) contract of agent—law of the place of agent business office; (j) contract for lease, sale or mortgage of real property—law of the place of property; (k) contract of the leasing of chattels—law of the place of lessor; (l) contract for storage and warehousing law of the place where the storekeeper's business office is located.

[198] *See id.*

[199] *See* GUOGUANG, *supra* note 137, at 531.

the public policy reservation. Once again, a foreign law will not be applied if the application will violate the social public order of China.

C. Determination of Foreign Law

In a case where foreign law is the applicable law to the contract, the notice and proof of foreign law becomes an issue. A critical matter is how to determine the content of foreign law. In civil law countries, a maxim known as "*jura novit curia*"—"the court knows law."[200] Derived from this maxim, in China it is the judicial function to determine the law and it is the judge's role to find the law. Thus, if the applicable law is a foreign law, the people's court shall investigate and determine the content of the foreign law and apply it accordingly.

If, however, the people's court is unable to find the content of the applicable foreign law, several channels may be explored. More specifically, at the request of the court, the foreign law may be provided by (a) the parties, (b) the central authority of the foreign country that has a judicial assistance treaty with China, (c) the Embassy or Consulate of China in that foreign country, (d) the Embassy of the foreign country in China, or (f) Chinese or foreign legal experts.[201] Nevertheless, if the foreign law could not be ascertained after the exhaustion of the above channels, Chinese law will be applied.[202]

Notably, in China the notice and proof of foreign law are primarily the function of the people's court *ex officio* (by virtue of the office). But scholars are trying to introduce a less *ex officio* approach in order to have the burden shared by the parties.[203] This attempt is reflected in the Model Law. Under Article 12 of the Model Law, when hearing a foreign civil case, the people's court may ask the parties to provide or identify the foreign law that ought to be applied. The people's court may also, at its own initiative, *ex officio* make a finding of the foreign law.[204]

The call for departure from the civil law tradition of judicial function *ex officio* reflects a trend in the Chinese judiciary to move towards the common law practice in which the judge generally plays a less active role in the court proceedings. In fact, the Supreme People's Court, in its efforts to further improve judicial justice, adopted the Rules of Evidence in April 2002. The Supreme People's Court tried to alleviate the court burden in obtaining evidence by shifting the burden of proof onto the shoulders of the

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[200] *See* HAY, CONFLICT OF LAWS, CASES AND MATERIALS 393 (11th ed. 2000); *see also* Imre Zajtay, *The Application of Foreign Law*, *in* 3 PRIVATE INTERNATIONAL LAW, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 9–15 (1971).

[201] *See* 1988 Opinions, *supra* note 8, at art. 193

[202] *Id.*

[203] *See* JIN, *supra* note 35, at 276; *see also* MODEL LAW, *supra* note 9, at art. 12, cmts.

[204] *See* MODEL LAW, *supra* note 9, at art. 12.

parties in civil litigation.[205]

VI. APPLICATION OF INTERNATIONAL TREATIES

Once again, a distinctive feature of Chinese private international law is the incorporation of the uniform substantive law rules. In general, there are two different sets of uniform substantive law rules: the rules unifying the domestic laws of different jurisdictions and the rules in international treaties regarding matters of cross-border business transactions, for example, transnational contracts.[206] In China, despite the "sovereign" status of Hong Kong and Macao, the inter-regional law conflicts are not a dominant phenomenon as in other countries like the United States. Thus, the uniform substantive law rules in the context of Chinese private international law mainly refer to international treaties, including international customs.

A. The Drive to "Get Connected" with the World and Universalism

Along with China's joining the WTO, enormous efforts are being made to try to get the country connected with the world, to help bring China into the mainstream world economy under the WTO framework.[207] One such effort is to "clean up" the existing laws, regulations, and rules that are inconsistent with the WTO rules due to China's accession to the WTO.[208] The challenge facing the people's courts then is how to implement the WTO rules and apply international treaties and customs in practices.[209] The challenge poses a crucial question as to whether international treaties take priority over Chinese domestic law.

At issue is the function of international treaties from the judiciary's viewpoint. For purposes of choice of law, the critical matter is whether the conflict of laws involves an international or a domestic law. There are two major theories that each offer a solution—universalism and nationalism. Universalism, or internationalism, envisages the problem of conflict of law as a problem of international relations, and looks for universal principles achieved through multinational treaties, by which the law conflicts between national sovereignties can be solved or avoided.[210] Conversely, nationalism considers conflict of laws a branch of domestic law and insists that the

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[205] *See* SUPREME PEOPLE'S COURT, THE SEVERAL RULES OF EVIDENCE CONCERNING CIVIL LITIGATIONS (2002); *see also* Mo Zhang & Paul J. Zwier, *Burden of Proof: Developments in Modern Chinese Evidence Rules*, 10 TULSA J. COMP. & INT'L L. 419 (2003).

[206] *See* WEINTRAUB, *supra* note 11, at 495.

[207] *See* CAO JIANMING, THE WTO AND CHINA JUDICIAL PRACTICES 20–22 (2001).

[208] *See id.* at 26–28.

[209] *Id.*

[210] *See* DONGGEN, *supra* note 73, at 16–17. For a general discussion about the historical evolution of the universalism, *see* Rodolfo De Nova, *New Trends in Italian Private International Law*, 28 LAW & CONTEMP. PROBS. 808, 808–21 (1963).

conflict of laws can not be deemed a part of international law.[211]

Most legal writings in China follow universalism and classify conflict of laws as international law that deals with civil and commercial matters as opposed to the public international law regulating affairs among sovereign countries.[212] The dominant argument is that the conflict of laws is designed mainly to dispose of the civil and commercial matters beyond national boundaries and involving the competing jurisdictions of different countries, and therefore it necessarily becomes a branch of international law.[213] Many further argue that with more efforts in unification of laws to avoid conflicts, the conflict of laws is moving toward internationalization.[214]

The endorsement of universalism in China is regarded as not only compatible with the nation's drive to get connected with the world, but also helpful to enhance the operative nature of the uniform substantive law rules in resolving the problems of conflicts.[215] There is no question as to whether the people's courts will apply international treaties to which China is a member. What remains to be answered, however, is how the international treaty is to be applied in the people's courts.

B. Application of International Treaties in People's Courts

The judicial application of international treaties encounters two basic issues: whether the people's courts may directly apply the international treaty to the controversy brought before it and which shall prevail if there is a conflict or discrepancy between the international treaty and domestic law. As far as foreign contracts are concerned, the issues will then be whether the parties may choose as the governing law the international treaty and whether a court may apply an international treaty when no choice was made by the parties.

Speaking broadly, there are three different approaches to the application of an international treaty. The first approach is called direct application, under which the international treaty may be directly applied in the courts of the country that is a party to the treaty except for those provisions to which the country has made a reservation. The second approach is termed indirect application. Pursuant to this approach, the international treaty may not be applied in domestic courts without a process

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[211] *See* DONGGEN, *supra* note 73, at 16–17. In between the two doctrines is the doctrine of dualism that defines conflict of laws as the law containing both international law rules and domestic law rules on the ground that both international law and domestic law are the sources of conflict of laws. *See* JIN, *supra* note 35, at 37.

[212] This would also explain why conflict of laws is called private international law.

[213] *See* DEPEI, *supra* note 28, at 11–12.

[214] *See* DONGGEN, *supra* note 73, at 12.

[215] *See* JIANMING, *supra* note 207.

of transformation of the treaty into the domestic law.[216] In other words, in order for the domestic court to apply an international treaty, there must be a statute passed by the nation's legislative body to implement the treaty. The third approach is referred to as the eclectic approach because it is basically a combination of the above two approaches.[217]

In China there seems to be no settled rule concerning the application of international treaties in people's courts. The only relevant provision is Article 142 of the 1986 Civil Code.[218] If an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from the civil law provisions of China, the provisions of the international treaty shall apply, except for those to which China has made reservations. Article 142 further provides that international customs may be applied if there is no applicable Chinese law or international treaty.[219]

Unfortunately, Article 142 is ambiguous. First of all, it is uncertain whether the preference of treaty over domestic law as implicated in Article 142 would be interpreted to mean that the international treaty would be applied directly by the courts. Second, it is unclear whether Article 142 actually authorizes the courts, without legislative action, to apply the international treaties or customs to the cases where their application becomes necessary. Finally, it is questionable whether later legislation may supersede the provisions of the treaty. Put differently, the question is whether the treaty should still prevail if later legislation appears to be inconsistent with the treaty.

Scholars in China have different views on this matter. Those advocating direct application argue that the treaty is directly applicable in China once approved by the National People's Congress ("NPC") because under the Chinese Constitution, only approval by the NPC is required for a

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[216] Behind these two approaches are the dualism and monism theories that are intended to define the relationship between domestic law and international law. Under dualism, domestic law and international law are two different systems regulating different subject matter and neither legal order has the power to create or alter the rules of the other. When domestic law provides for application of international law within the jurisdiction, this is merely an exercise of the authority of domestic law, an adoption or transformation of the rules of the international law. Therefore, application of international law in domestic courts is indirect. Monism, however, emphasizes the supremacy of international law and reduces domestic law to the status of pensioner of international law. Pursuant to monism, international law will be enforced directly in the domestic courts. *See* BURNS WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER, A PROBLEM-ORIENTED COURSEBOOK 229–33 (3d ed. 1997).

[217] For example, in the United States, treaties are divided into self-executing and non-self-executing. A treaty would become enforceable in the courts of the United States only if it were self-executing. If a treaty were non-self-executing, it would be enforceable only if and when it had been implemented by federal statute. *See* Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985).

[218] *See* 1986 Civil Code, *supra* note 5.

[219] *Id.*

treaty to become effective in China.[220] It is further argued that NPC approval is just a formality that does not involve the substance of the treaty, and thus the legislative implication in domestic law is not a condition for the application of the treaty.[221]

Others disagree with the direct application approach by pointing out that application of a treaty involves the exercise of national sovereignty and therefore shall not take place automatically in domestic courts without legislative authorization.[222] Some also suggest having direct application limited to treaties regarding general civil and commercial matters, and indirectly applying treaties that involve policy matters, such as the WTO. The concern is the complexity of such treaties as well as a lack of knowledge and competency of the judges in this regard.[223]

In practice, the Supreme People's Court seems to favor the direct application of international treaties and customs, at least for general civil matters.[224] On the one hand, the Supreme People's Court tends to allow the parties to a contract to choose a treaty as governing law. In its Notice on Several Questions that Deserve Attentions Concerning Trial and Handling of Foreign Civil and Commercial Cases, issued on April 17, 2000, the Supreme People's Court explicitly instructed the lower courts to honor the choice of law clause made by the parties, and to give priority to the application of international treaties as well as international customs.[225]

On the other hand, the Supreme People's Court has directed the lower courts to apply the provisions of the CISG in contract cases.[226] According to the Supreme People's Court, since the CISG has become effective in China, with regard to a contract that involves CISG member states and disputes arising therefrom, the provisions of the CISG shall automatically and directly be applied unless the contract indicates otherwise.[227] In fact, there have been cases where the people's courts applied the CISG provisions.

In *Shanghai Dong Da Import and Export Co., Inc. v. Laubholz-Meyer Company*,[228] plaintiff, a Shanghai company, entered into a contract on

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[220] *See* SHUANGYUAN, *supra* note 65, at 365–66.

[221] *Id.*

[222] *See* Liu Hanfu, *Matters Concerning Direct Application of the WTO in the People's Courts*, 7 PEOPLE'S JUST. 49 (2000).

[223] *See* JIANMING, *supra* note 207, at 254–58.

[224] *Id.*

[225] *See* SUPREME PEOPLE'S COURT, THE NOTICE ON SEVERAL QUESTIONS THAT DESERVE ATTENTIONS CONCERNING TRIAL AND HANDLING OF FOREIGN CIVIL AND COMMERCIAL CASES (2000), *available at* http://www.law-lib.com.

[226] *See* SUPREME PEOPLE'S COURT, 1989 NOTICE OF THE MEETING MINUTES OF THE TRIAL WORK IN COSTAL AREAS ON ECONOMIC CASES INVOLVING FOREIGN, HONG KONG AND MACAU ELEMENTS, *available at* http://www.court.gov.cn.

[227] *Id.*

[228] *See* QI QI, THE 2003 SELECTED CASES TRIED BY PEOPLE'S COURTS IN SHANGHAI 166–

March 15, 2001 with defendant, a German Corporation, under which defendant would sell to plaintiff fifteen cubic meters of special timber known as "Hornbeam." On May 28, 2001, plaintiff received 13.999 cubic meters of timber from defendant for which plaintiff paid defendant approximately $5179.63 plus custom duties. However, an initial inspection indicated that the timber received did not conform to the terms of the contract. Plaintiff then asked the local Entry/Exit Bureau of Examination and Quarantine for further inspection. In the Inspection Certificate issued by the Bureau on June 14, 2001, it stated that among the imported timber, about 192 pieces were not Hornbeam, amounting to 2.628 cubic meters, and about 52% of the timber was of poor quality.

Plaintiff brought the action for damages against defendant at Shanghai Yangpu People's Court. During the trial, the parties disagreed over whether defendant's breach would amount to a "fundamental breach." In the determination of applicable law, the court held that since the parties did not choose the governing law for the contract, and the countries of which the parties are citizens are both members of the CISG, the contract falls within the scope of the application of the Convention, and the Convention shall first be applied. The court then found defendant liable because the defendant's failure to deliver goods meeting the specification and quality provided in the contract constituted a "fundamental" breach in the context of the provisions of the CISG.[229]

This case was selected by the Shanghai High People's Court for publication in part because of its exemplary application of an international treaty. The case became a prototype for a number of reasons. First, this is a case where the people's court directly applied an international treaty to the foreign contractual dispute.[230] Second, in this case the people's court made the parties subject to the provisions of the treaty without referring to any domestic legislation.[231] Third, the application of the treaty was initiated by the people's court absent the parties' choice of law.[232] In its editorial analysis, the Shanghai High People's Court further pointed out that provisions of the CISG should be applied in the people's courts when (1) the countries involved are the members of the CISG, and (2) there was no choice of law made by the parties to the contract.[233]

VII. CONCLUSION

Chinese private international law remains far less sophisticated both in

70 (2004).

[229] *Id.*

[230] *Id.* at 168.

[231] *Id.* at 168–69.

[232] *Id.* at 168.

[233] *Id.* at 170.

theory and in practice as compared with that of the United States or major European countries. First, the current private international law legislation in China is scattered throughout different laws and there is clearly a lack of systematic form. Most provisions of the existing legislation were adopted in a way that was experimental and pragmatic to the extent that the laws may be easily adjusted or modified to meet the needs of the nation. As a result, these provisions are not only limited to certain matters, but are also often hard to follow, particularly in complicated cases.[234]

Second, private international law scholarship in China, at present, by and large is focused on the introduction of foreign doctrines into the nation. It is true that scholars in China have made great efforts to try to develop a school of Chinese private international law. Equally true is that several new ideas and thoughts are being discussed. But as discussed in this article, these ideas and thoughts all need to be further refined and improved.

Third, the judges in the people's courts are generally not ready and lack the quality, experience, and knowledge to handle foreign cases, particularly when jurisdiction and choice of law are at issue. Although the Civil Code has been in force for nearly twenty years, the number of foreign civil cases tried in the people's courts has been quite small, though the number is growing over the years, with most of cases involving Hong Kong and Macao.[235]

However, do not underestimate the potential influence of the development of private international law in China on scholarship and practice in this area of law. The "China Phenomenon" may play a unique part in helping deal with choice of law issues in international settings as well as, to certain extent, in inter-regional conflict of laws. For example, the theory of "uniform substantive law rules," advocated by many Chinese scholars, will perhaps have an impact on both the way to solve law conflicts and the dimensions of the conflict of laws. In addition, the flexible approach to the choice of law by the parties will certainly help enhance the expectations of the parties to the contract and the predictability of the consequences of the parties' conduct.

At present, China is revising the 1986 Civil Code with an ambitious plan to produce a more comprehensive civil law legislation. As part of the revision, newly structured choice of law legislation will be adopted in the form of either a special chapter in the comprehensive civil code or a separate law of foreign civil relations.[236] Whatever form, it is conceivable

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[234] Chapter 8 of the 1986 Civil Code is the most significant and primary private international law legislation in China. But it contains only nine articles that deal with contractual obligations, torts, and succession. *See* 1986 Civil Code, *supra* note 5.

[235] The number of cases will be much smaller if you are looking for the foreign civil cases where application of foreign law was at issue.

[236] A debate is continuing in China on whether the country should have separate private

that the Model Law, which has a total of 166 articles, will serve as a blueprint, with many of the provisions in the Model Law being incorporated into the new legislation.

international law legislation. The Model Law seems to be in favor of a separate legislation rather than a chapter formulated one.